

Before the  
Federal Communications Commission  
Washington, D.C. 20554

FCC 05M-23  
04305

In the Matter of )  
 )  
Florida Cable Telecommunications )  
Association, Inc.; Comcast Cablevision of )  
Panama City, Inc.; Mediacom Southeast, )  
L.L.C.; and Cox Communications Gulf, )  
L.L.C., )  
 )  
Complainants, )  
 )  
v. )  
 )  
Gulf Power Company, )  
 )  
Respondent. )

EB Docket No. 04-381

**STATUS ORDER**

**Issued:** April 14, 2005

**Released:** April 15, 2005

**Preliminary Statement**

Because of the length of time that Gulf Power will be conducting a Pole Attachment Survey and the multiple discovery and evidentiary issues possibly impacting the hearing of this case, the Presiding Judge has reviewed the current state of discovery and the Pole Attachment Survey that Gulf Power is conducting.

Estimated length of completion of Pole Attachment Survey prompted prehearing conference of March 30, 2005. *See* Gulf Power's Motion for Extension of Time filed on March 23, 2005, wherein Gulf Power reported that it had signed a statement of work with Osmos, Inc. to conduct the survey which was projected to take as long as seven (7) months to complete. Gulf Power represents that it cannot identify specific poles it contends are "crowded" or at "full capacity" until the audit is completed. Gulf Power will be submitting month-end status reports. *See Order* FCC 05M-18, released April 1, 2005.

## **Background**

The Enforcement Bureau ("Bureau"), by delegated authority, set this matter for formal hearing on the question of the amount of attachment fees Gulf Power may charge above marginal costs, if any. *In re Florida Cable Telecommunications Ass'n. et al. v. Gulf Power Co., Hearing Designation Order*, EB Docket No. 04-381 (DA 04-3048), released September 27, 2004 ("*HDO*").

The ultimate question for determination is whether Gulf Power may recover compensation above its marginal costs, or is Gulf Power limited to current compensation under the FCC Cable Formula, 47 C.F.R. § 1.1409(e)(1), the statutorily prescribed methodology for calculating a maximum pole attachment rate that a power company can charge a cable attacher. *Id.*

The issue set under the *HDO* is:

Whether Gulf Power is entitled to receive compensation above marginal costs for any attachments to its poles belonging to the Cable Operators, and, if so, the amount of any such compensation.

*Id.* at Para. 11.

## **Clarification and Motion to Strike**

The Presiding Judge issued *Prehearing Order* FCC 04M-28, released October 1, 2004, requiring parties to file Preliminary Statements on Alternative Cost Methodology. On October 20, 2004, a Petition for Clarification of the *Prehearing Order* was filed by Florida Cable Telecommunications Association, Inc. ("Complainants").

Complainants claim to need "clarification" and request a "finding" on the extent to which the Cable Formula already provides Gulf Power with adequate compensation in excess of marginal costs. Such "clarification" also is sought to determine the scope of the preliminary submission on "alternative cost methodology" required under *Prehearing Order* FCC 04M-28, released October 1, 2004, at 2. Gulf Power moved to strike Complainants' clarification request and argues in its Motion to Strike that Complainants are "recycling" arguments presented to and rejected by the Bureau in the pre-designation phase of the proceeding. The Presiding Judge deferred ruling and required submission of Preliminary Statements on Alternative Cost Methodology ("Preliminary Statements") by December 3, 2004. *Order* FCC 04M-39, released December 1, 2004.

After accommodating post hurricane clean-up in Florida, the first prehearing conference was held on December 13, 2004.

### **Preliminary Statements**

On December 3, 2004, Gulf Power and Complainants filed their respective Preliminary Statements on Alternative Cost Methodology.

Gulf Power posits three "alternative cost methodologies:" sales comparisons, current replacement cost, and federal concessions leasing model, theories which may not be mutually exclusive. Gulf Power represents that it intends to present expert testimony on each of these three theories.

The Complainants have no burden of proof so comments are more defensive than expository. Complainants argue in their Preliminary Statement that Gulf Power is not entitled to compensation above the Cable Formula (47 C.F.R. § 1.1409(e)(1)). Complainants do concede that when a pole is proven to be "full," Gulf Power may be entitled to something more than just marginal costs as "just compensation." However, Complainants argue that Gulf Power already receives a form of "just compensation" which is more than marginal costs. Complainants submit that the "Cable Formula" provides not only for marginal costs (make-ready) but also includes annual payments "representing a show of all operating costs" attributable to cable attachment's proportion of useable space, plus a component for "recoverable profit," which satisfies any "loss to owner." Complainants argue that this is "just compensation" and Gulf Power is entitled to no more.

Under unresolved issues that were argued before the Bureau prior to issuance of the *HDO*, Gulf Power failed to convince the Bureau that increases in rent from \$5 and \$6.20 per pole to \$38.06 per pole were warranted as "just compensation". Complainants critical arguments include: (1) "just compensation" is measured by "loss to property owner" and not "benefit to taker;" (2) market value methodology is irrelevant because there is no "market" for attachments to utility poles; (3) an "income approach" cannot apply to attachments to limited portions of utility poles; (4) Gulf Power has not proven any "actual losses;" and (5) Gulf Power had not supported inclusion of "FERC accounts," or "average pole height," or "useable space figures."

Finally, Complainants argue that the Bureau has rejected Gulf Power's "replacement cost methodology" and inclusion of "unrelated cost accounts," citing *Gulf Power Order*, 18 F.C.C. Rcd 9599, released May 13, 2001. That ruling held that Gulf Power had "submitted no evidence in th[e] proceeding that would satisfy the test articulated by the Eleventh Circuit." Thus, the conclusion is that Gulf Power must produce here the relevant evidence. In fact, this hearing was set at the request of Gulf Power, based upon its Description of Evidence which it sought to present to an Administrative Law Judge. See *HDO* at Paras. 4, 5.

### **Gulf Power's Burdens**

The standard was reiterated by the Presiding Judge that:

[Gulf Power] --- must show with regard to each pole that (1) the pole is at *full capacity* and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations.

Gulf Power - - - bears the burden of proceeding with the introduction of evidence and the burden of proving it is entitled to compensation above marginal cost *with respect to specific poles*.

*Order* FCC 04M-41, released December 15, 2004.

At a conference conducted on December 13, 2004, it was decided in connection with showing (or failing to show) *full capacity with respect to specific poles*, that Gulf Power be authorized to conduct a pole by pole survey to show which Gulf Power poles to which Complainants have attached cable, are utilized at full capacity. Also, limited expedited discovery was ordered for production of "planning documents" (Gulf Power) and "inventory/accounting/schematic documents" (Complainants). *Order* FCC 04M-41, *supra*.<sup>1</sup>

### **Status Report**

In a Joint Status Report on discovery that was filed on January 14, 2005, the parties reported that they had completed the required exchange of business documents. In a substantial document production, Complainants provided Gulf Power with "inventory, accounting and schematic" documents accounting for the Gulf Power poles being utilized for cable. Also included were "facilities maps" prepared by engineers that document Complainants' "cable distribution plant."<sup>2</sup>

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<sup>1</sup> The rulings were grounded on holding in *APCO v. FCC*, 311 F3d 1357, 1370-71 (11<sup>th</sup> Cir. 2002) (power company must prove "with regard to each pole" that the pole is at full capacity).

<sup>2</sup> These "facilities maps" were used in making application for permits and should show precise locations of Gulf Power poles to be used. Complainants suggest that these maps could be used "to confirm the universe of poles to which Complainants are attached." If the parties can agree to a Stipulation on a relevant universe of poles, it could contribute to this hearing.

Such facilities maps, pole attachment invoices, and billings for make-ready work<sup>3</sup> and pole change-outs<sup>4</sup> (costs charged to cable attachers) now are available to both parties for at least partially confirming a pole count universe. However, as Complainants concede, these records are associated with costs charged by Gulf Power for attaching Complainants' cables, and such costs do not account for other possible attachers. Nor do such costs provide pole by pole detailed measurements or potential future use by Gulf Power and/or by third parties who are not related to Complainants. Thus, the business records relating to poles to which Complainants' cable are attached have limitations which could be supplemented by a Survey.

Gulf Power concedes in the Joint Status Report that subject to routine verifications of authenticity and legibility, the business records produced by Complainants in January 2005:

Will bear on the *threshold issue of pole crowding*, particularly in conjunction with additional Gulf Power data and the data proposed to be developed by a third party consultant.

There seems to have been progress in connection with the expedited document production.

The parties should be more consistent in terminology in describing pole utilization as "full capacity" or "fully utilized". The term "pole crowding" is ambiguous. The Eleventh Circuit holds there to be no right to consider more than marginal costs unless a pole is at "full capacity," which standard of proof was adopted by the Commission. *Gulf Power Order*, 18 F.C.C. Rcd at 9607, ¶15.

### **Gulf Power's Internal Local Studies**

Complainants received in the expedited document production, "distribution load studies" prepared by Gulf Power. These internal studies describe "voltage feeder line loading profiles and estimates" and "assess capacity needs of various electricity substations." Complainants contend that such "load studies" do not describe utilization of pole capacity but merely show steps related to "voltage and capacity." More importantly, these load studies do not contain definitive information on pole utilization. Rather, the load studies appear to be concerned with "thermal" measurement, taken into account by Gulf Power for "core electric functions" or "encroachment into the 'communications space' where Complainants attach their cable." (Joint Status Report at 6.)

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<sup>3</sup> "Make-ready" refers to work, costs and expenses associated with effecting attachments of cable to power-line poles.

<sup>4</sup> "Change-out" means replacement or substitution of a pole which may be a part of "make-ready" work. A "change out" may result from a cable attacher's request, or may be required by a local government, or may be required by Gulf Power in providing electric power that would be unrelated to cable communication.

But notwithstanding limitations, Gulf Power argues that its load studies have relevance to its burden of proof:

As explained in Gulf Power's January 9, 2004 *Description Of Evidence* (which led to the FCC's entry of the Hearing Designation Order), these studies, in conjunction with testimony of Gulf Power's distributions planners and engineers, evidence the core business plan/purpose of Gulf Power's distribution system (to provide electricity to its customers vs. serve as host to CATV attachers) and the impact of third-party attachers on Gulf Power's core business plans and operations. In addition to the *impact of reserved space* on the crowding analysis, Gulf Power's Distribution Studies also bear on the "*higher valued use*" component of the Eleventh Circuit's test.

*Joint Status Report* at 7. (Emphasis added.)

#### **Pole Attachment Survey**

The Pole Attachment Survey currently being undertaken by Gulf Power should, at a minimum, fill in gaps on individual pole utilization that appear in the parties' business documents. Both parties appear to recognize the merit and need for a definitive pole utilization survey, as stated in their *Joint Status Report* of January 14, 2005:

Gulf Power's burden of proof and production in this proceeding --- would be demonstrated by Gulf Power's own records concerning all attachers on specific poles or addressed for current pole situations in a *study by a qualified, third party consultant or accountant "with respect to each pole amend/or controlled by Gulf Power that is occupied by all or any of the Complainant cable companies."* (Emphasis added.)

*See Order FCC 04-41, supra at 2, cited in Joint Status Report at 4.*

#### **Description of Evidence**

Complainants' main criticisms of Gulf Power's case to date relates to Gulf Power's *Description of Evidence* submitted to the Bureau on January 8, 2004. The *Description of Evidence* was proffered by Gulf Power to the Bureau prior to issuance of the *HDO*.

The Description of Evidence was proffered as representing the types of evidence Gulf Power would introduce in this evidentiary hearing to satisfy the *Alabama Power v. FCC* test, specifically:

(1) evidence of pole change-outs to accommodate new attachments of telecommunications carriers over unspecified years (some for 1998-2002) along with evidence that some of these new telecom attachers pay an "unregulated rate" for pole space on some poles; (2) evidence of make-ready for twelve different cable operators (and their geographic overlap) that have paid for change-outs of unspecified poles over an unspecified period of time; (3) load studies and business plans addressing the potential impact of unforetold third-party attachments; (4) evidence depicting what crowded poles look like; and (5) unspecified "other" evidence that Gulf Power may later discover. *See* Description of Evidence Gulf Power Seeks To Present In Satisfaction of the Eleventh Circuit's Test at 3-9 ("Gulf Power Description of Evidence").

At Prehearing Conference conducted on January 31, 2005, counsel for the Bureau commented on "Gulf Power's burden of proceeding with evidence as outlined in Description of Evidence, *in addition to its pole attachment survey evidence and related expert testimony*. Order FCC 05M-03, released February 2, 2005. (Emphasis added.)<sup>5</sup> "We believe that a pole survey is necessary at this point because Gulf Power does not appear to have a good handle on the number of poles that they are alleging are [fully utilized]." (Prehearing Conference, Tr. 126.)

But in addition to the Pole Attachment Survey, which is essentially a physical pole count,<sup>6</sup> existing evidence related to the Description of Evidence must be produced to the Bureau and the Complainants in discovery. It is expected that some, much, or all of such evidence will be offered by Gulf Power at hearing.

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<sup>5</sup> See Transcript of Prehearing Conference of January 31, 2005, at Tr. 126-130 (Bureau argues position that "full capacity" is a mixed question of fact and law.

<sup>6</sup> This description of a "physical pole count" is not to diminish the significance of the Survey and its importance to resolving this case by a preponderance of reliable evidence. *See* Statement of Work, "Joint Use Audit Prepared for Gulf Power Company, March 24, 2005," Osmose, Inc., Syracuse, New York.

Proof derived from the Description of Evidence would be independent of the Pole Attachment Survey, although Survey results might fill in gaps of the evidence envisioned in the Description of Evidence. (See Statement of Work Joint Use Audit prepared for Gulf Power Co., March 4, 2005.) But it is important for Gulf Power to recognize that the fact that the Pole Attachment Survey may one day produce additional evidence that will also be responsive to some of the current interrogatories and/or document requests does not excuse Gulf Power from providing complete interrogatory answers with respect to the proof it had on January 8, 2004, that relate to its Description of Evidence. (March 30<sup>th</sup> Conference, Tr. 192)

#### **Pending Discovery – 47 C.F.R. § 1.311 *et. seq.***

The Presiding Judge has reviewed Complainants' First Set of Interrogatories To Respondent Gulf Power Company" and finds the questions to be facially relevant for discovery under the Commission's discovery rules. Referring to Gulf Power's Description of Evidence and Preliminary Statement, Complainants seek responses and explanations for such things as "full capacity," "waiting in the wings," "higher valued use with its own operations," proof of actual losses caused by Complainants' cable attachments, identification by pole of what would be a "just compensation," and the identification of persons who participated in preparing the Description of Evidence submitted to the Bureau in January 2004, and the Preliminary Statement submitted in December 2004. These appear on their face to constitute fair questions to pose to Gulf Power, the party seeking a substantial increase in monetary rent.

The *HDO* provides "that Gulf Power should be afforded the opportunity to present the evidence delineated in its Description of Evidence, and whether Gulf Power is entitled to receive compensation above marginal cost is a determination left for the presiding Administrative Law Judge." *HDO* at Para. 5 and fn. 21. On February 1, 2005, after expedited exchange of relevant business documents, Complainants served interrogatories and request for documents which appear to relate to Gulf Power's Description of Evidence. Therefore, such questions should be answered and not avoided or deferred needlessly to the completion of the Pole Attachment Survey in the fall.

#### **Timeliness and Continuing Duty**

The Presiding Judge set **April 18, 2005**, as the date for Gulf Power and Complainants to answer or object to interrogatories, and to produce documents or object to requests. *Order FCC 05M-18*, released April 1, 2005. It is the obligation of both parties to comply on the due date. Gulf Power represented to the Bureau precisely how it would prove damages by filing its Description of Evidence. It was filed in response to the Bureau's request for Gulf Power to describe "the evidence it wishes to proffer in an effort to satisfy the standard articulated by the [Eleventh Circuit] relating to compensation above marginal cost." (Letter dated December 9, 2004, to Gulf Power from Deputy Chief,

MDRD/Enforcement Bureau.) Gulf Power made its Description of Evidence proffer and therefore Gulf Power is expected to have authentic and reliable proof to back up its proffer. The interrogatories appear designed to flush out the proof.

And since interrogatories served on a party are continuing, Gulf Power has the further obligation to supplement its answers to interrogatories as additional information becomes available through the ongoing and eventually completed Pole Attachment Survey.

### **Theory/Evidence of Damages**

The ultimate issue is "damages". The results of the Pole Attachment Study supplement, but do not substitute for, evidence proffered in the Description of Evidence. The proof offered in connection with the Description of Evidence constitutes relevant evidence to consider in determining whether Gulf Power has met its burden of proof. The results of the Pole Attachment Survey add to and supplement the proof proffered by the Description of Evidence. The Survey is relevant to proving "full capacity" with respect to "specific poles". It is in the context of a surveyed definitive pole count and identification of "full capacity" poles that Gulf Power shall establish any right to damages, to be measured by evidence outlined in the Description of Evidence (e.g. change-outs, unregulated rates paid on some poles, evidence of make-ready for different cable operators that have paid for change-outs of unspecified poles; load studies and business plans; depictions of crowded poles; unspecified other evidence).

On March 30, 2005, at a prehearing conference, Gulf Power refined its method of proof, and represented in open court:

I can say that our current replacement cost methodology will have a lot of similarities to the cable rate and the telecom rate. The key difference, and there will be some other differences, but the key difference will be the use of current replacement cost versus historical costs.

\* \* \*

But a lot [of] the same accounting that goes into the cable rate will be the accounting that we use in our current replacement cost methodology.

(Prehearing Conference, Tr. 192.)

### **Discovery Compliance**

Gulf Power may have produced responsive studies in January 2005, and its answers to interrogatories and document requests may so reflect. But complete answers will be required. However, although full cooperation and compliance with discovery is encouraged and expected, Gulf Power may, for good cause, object on a question by question basis. 47 C.F.R. § 1.323(b).

If necessary, Complainants may seek compliance by motion, and the question(s) will be decided by the undersigned.<sup>7</sup> 47 C.F.R. § 1.323(c)(d). Such interlocutory discovery rulings are not appealable. 47 C.F.R. § 1.323(e).

### **Other Business**

The parties signed and submitted, and the Presiding Judge approved, a Stipulation and Agreed Confidentiality Order, dated February 10, 2005.

Complainants have submitted a Statement That All Necessary Cable Companies are Parties to the Case, filed on February 28, 2005.

### **Conclusion**

The evidence proffered by Gulf Power in its Description of Evidence filed January 8, 2005, is relevant for purposes of discovery and some or all may be offered into evidence for submission into the record at hearing, subject to any objections and rulings.

It is expected that by **April 18, 2005**, Gulf Power will fully describe and/or produce all documents and answer all questions posed in interrogatories that relate to its Description of Evidence.

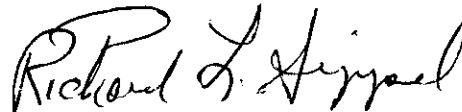
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<sup>7</sup> If there are responsive documents that are not being produced due to asserted privilege or work product, documents withheld must be identified by subject, date, author(s) and recipient(s). If Complainants wish to pursue such documents, a motion must be filed and Gulf Power must reply to show the application of a privilege or exemption from discovery.

At times that interim and final results of the Pole Attachment Survey become responsive to continuing interrogatory questions, Gulf Power must supplement its answers to interrogatories and/or requests for documents within ten business days of its receipt of responsive survey information/data.<sup>8</sup>

SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION<sup>9</sup>

A handwritten signature in black ink, reading "Richard L. Sippel". The signature is written in a cursive, flowing style with a large initial 'R'.

Richard L. Sippel  
Chief Administrative Law Judge

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<sup>8</sup> Such amended discovery must be disclosed within a reasonable time after it is discovered, and not await the completion of a final report of Osmos and Pole Study.

<sup>9</sup> Courtesy copies of this *Order* were transmitted to counsel for each of the parties by e-mail on the date of issuance.